87-2030

Supreme Court, U.S.
FILED
NOV 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

SHARON ANNETTE HATFIELD ANDERSON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

LACY H. THORNBURG
Attorney General of
North Carolina

Edwin M. Speas, Jr.
Special Deputy Attorney General

Thomas J. Ziko
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 733-7387

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THE SUPREME COURT OF NORTH CAROLINA'S DECISION FINDING NO PREJUDICIAL ERROR IN THE TRIAL COURT'S INSTRUCTIONS REGARDING THE VALUE PRONG OF THE OBSCENITY TEST IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN *POPE V. ILLINOIS*, 481 U.S. ___, 107 S. Ct. 1918 (1987). 3

II. THE ALLEGED ERRORS IN THE TRIAL COURT'S DECISIONS REGARDING THE ADMISSION OF EVIDENCE AND PROSECUTOR'S ARGUMENTS DID NOT VIOLATE THE PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL. 4

III. THE SUPREME COURT OF NORTH CAROLINA'S HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED THE TESTIMONY OF DR. SCOTT IS CONSISTENT WITH THIS COURT'S OPINIONS REGARDING THE ADMISSION OF EXPERT TESTIMONY IN OBSCENITY CASES AND THE RULES OF EVIDENCE. . . 5

IV. THE SUPREME COURT OF NORTH CAROLINA'S HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED PORTIONS OF DR. WINNICK'S TESTIMONY IS CONSISTENT WITH THIS COURT'S OPINIONS AND THE RULES OF EVIDENCE. 10

V. THE SUPREME COURT OF NORTH CAROLINA PROPERLY REFUSED TO REVERSE THE PETITIONER'S CONVICTION ON GROUNDS OF PROSECUTORIAL MISCONDUCT. 12

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

PAGE

Berger v. United States, 295 U.S. 78 (1975) 12

Burgett v. Texas, 389 U.S. 109 (1967) 5

Cinema I Video v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E.2d 383 (1987) 11

Darden v. Wainwright, 477 U.S. 168 (1986) 13

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 5

Donnelly v. De Christoforo, 416 U.S. 637 (1974) 5, 13

Hamling v. United States, 418 U.S. 87 (1974) 8, 9

Kaplan v. California, 413 U.S. 115 (1973) 7

Lisenba v. California, 314 U.S. 219 (1941) 5

Miller v. California, 413 U.S. 15 (1972) 7, 11

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 9, 11

Pope v. Illinois, 481 U.S. ___, 107 S. Ct. 1918 (1987) ... 3, 4

Smith v. California, 361 U.S. 147 (1959) 7

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 4

Fed. R. Evid. 403 ..... 8, 12

Fed. R. Evid. 702 ..... 8, 12

Fed. R. Evid. 70 8

N.C.G.S. § 8C-1, Rule 403 (1986) 8, 12

N.C.G.S. § 8C-1, Rule 702 (1986) 8

N.C.G.S. § 8C-1, Rule 703 (1986) 9

N.C.G.S. § 14-190.1 (1985) 1, 6, 12

N.C.G.S. § 14-190.1(a)(1) (1985) 2

28 U.S.C. § 1257(3) 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

SHARON ANNETTE HATFIELD ANDERSON

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE CASE

In this case the Petitioner, Ms. Sharon Anderson, was convicted on two counts of disseminating obscenity in violation of N.C.G.S. § 14-190.1 (1985). The evidence for the state tended to show that on 7 October 1985 an investigator with the Hickory Police Department entered the Imperial Popular Newsstand and Adult Bookstore. On that occasion Ms. Anderson sold the investigator two magazines entitled "Jets of Jizz" and "Ass Masters Special 3". On 8 October 1985 the investigator returned to the store. On that occasion Ms. Anderson sold him two magazines entitled "Super Sex Stars 1" and "Ass Masters Special 4". The Petitioner was subsequently arrested and charged with four counts of disseminating obscenity in violation of N.C.G.S. § 14-190.1(a)(1) (1985). Appendix to Petition (herinafter "A.P.") p. A-2.

During the State's case-in-chief the prosecution presented the testimony of the investigating officer who purchased the magazines from Ms. Anderson and also entered into evidence the four magazines which provided the basis for the charges. A.P., p. A-2.

During her case-in-chief, Ms. Anderson attempted to introduce the opinion testimony of two alleged experts, Dr. Joseph Scott and Dr. Charles Winnick. The trial court excluded portions of these witnesses' testimony. Ms. Anderson also took the stand to testify in her own defense. On direct examination she testified that she was not aware of the contents of the magazines in question when she sold them to the investigating officer and did not recall the sales for which she was charged. On cross examination, however, Ms. Anderson admitted that she knew that the Imperial Popular Newsstand and Adult Bookstore was an adult bookstore, that she had sold magazines similar to those in issue on a daily basis while employed at the bookstore, that she was aware of the change in the obscenity law of North Carolina which had taken effect on 1 October 1985, that from her conversations with a police officer she had a feeling that something "was going down," and that a police officer had kept telling her that she needed to get out of the store before she was arrested. A.P., pp. A-3 to A-4.

The jury returned a verdict acquitting Ms. Anderson on the charges arising out of the sale of the magazines "Jets of Jizz" and "Super Sex Stars 1". The jury, however, found Ms. Anderson guilty of disseminating obscenity in violation of N.C.G.S. § 14-190.1(a)(1) (1985) for selling the magazines entitled "Ass Masters Special 3" and "Ass Masters Special 4".

REASONS FOR DENYING THE WRIT

I. THE SUPREME COURT OF NORTH CAROLINA'S DECISION FINDING NO PREJUDICIAL ERROR IN THE TRIAL COURT'S INSTRUCTIONS REGARDING THE VALUE PRONG OF THE OBSCENITY TEST IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN *POPE V. ILLINOIS*, 481 U.S. ___, 107 S. Ct. 1918 (1987).

In its charge the trial court properly instructed the jury to apply "contemporary community standards" when determining whether the material at issue was patently offensive or appealed to a prurient interest in sex. The trial court, however, did not instruct the jury to utilize "contemporary community standards" when determining whether the material at issue lacked serious literary, artistic, political or social value. Instead, the trial court simply instructed the jury:

> "The third essential element of obscenity, which the State must prove beyond a reasonable doubt is that the material taken as a whole lacks serious literary, or serious artistic, or serious political, or serious scientific value."

The Petitioner did not request any instructions which were substantially different from the instruction given on this point and the Petitioner did not object to this portion of the instructions. Nevertheless, following this Court's decision in *Pope v. Illinois*, 481 U.S ___, 107 S. Ct. 1918 (1987), Ms. Anderson petitioned the Supreme Court of North Carolina to review the issue of whether this instruction violated the holding in *Pope*. The Supreme Court of North Carolina granted that petition. A.P., p. A-13.

In disposing of this issue the Supreme Court of North Carolina noted that, unlike the trial court in *Pope*, the trial court here had not erroneously instructed the jury to apply contemporary community standards when determining the value of the materials in question. Instead, the trial court

simply failed to expressly instruct the jury that it must apply a "reasonable person" standard when determining the value of the material taken as a whole. Second, the Supreme Court of North Carolina noted that this Court had recognized that a trial court in an obscenity prosecution is not constitutionally obligated to expressly instruct the jury to utilize a "reasonable person" standard when determining the value of the material taken as a whole. *Pope v. Illinois,* 107 S. Ct. at 1921, n.3. Finally, the Supreme Court of North Carolina concluded that any error in the trial court's instructions "did not amount to prejudicial error." A.P., pp. A-21 to A-22. This determination was entirely consistent with this Court's decision to remand *Pope* to the Illinois Court of Appeals to consider whether the trial court's erroneous instructions constituted harmless error in that case. *Pope v. Illinois*, 107 S. Ct. at 1922-1923.

A review of the Supreme Court of North Carolina's opinion on this issue amply demonstrates that the court properly reviewed the instructions of the trial court in light of this Court's decision in *Pope* and determined that whatever error might have occurred was not prejudicial. Therefore, the Petitioner's claim that the Supreme Court of North Carolina's decision is in conflict with the holding in *Pope* is incorrect.

II. THE ALLEGED ERRORS IN THE TRIAL COURT'S DECISIONS REGARDING THE ADMISSION OF EVIDENCE AND PROSECUTOR'S ARGUMENTS DID NOT VIOLATE THE PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The Petitioner has requested a writ of certiorari under 28 U.S.C. § 1257(3). Pursuant to that statute, this Court does "not sit as a court of criminal appeals to review state cases." *Burgett v. Texas*, 389 U.S. 109, 113 (1967). This Court's only power over state judicial proceedings is to correct them to the extent they incorrectly adjudge federal rights. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977). Questions regarding the admissibility of evidence and the conduct of prosecutors during closing argument are generally matters of state law and procedure which do not implicate

specific constitutional protections. *Burgett v. Texas*, 389 U.S. 109, 113-114 (1967); *Donnelly v. De Christoforo*, 416 U.S. 637, 642-644 (1974).

In order to bring the present petition within the scope of this Court's jurisdiction, Ms. Anderson claims that the trial court's decisions regarding the admission of her proffered expert opinion testimony and the prosecutor's arguments violated her Fourteenth Amendment right to due process. In order to constitute a denial of due process, however, the alleged errors must have been so egregious and prejudicial as to result in a deprivation of "that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

In the arguments set out below, the Respondent contends that the issues presented in the Petition do not even rise to the level of ordinary trial error. But, even if the trial court had erred on one or more of the points presented in the Petition, those errors did not deprive Ms. Anderson of her due process right to a fair trial. "The Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Insofar as the alleged errors did not so infect the Petitioner's trial with unfairness as to constitute a denial of due process, this Court should not issue a writ of certiorari under 28 U.S.C. § 1257(3).

III. THE SUPREME COURT OF NORTH CAROLINA'S HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED THE TESTIMONY OF DR. SCOTT IS CONSISTENT WITH THIS COURT'S OPINIONS REGARDING THE ADMISSION OF EXPERT TESTIMONY IN OBSCENITY CASES AND THE RULES OF EVIDENCE.

During her case-in-chief Ms. Anderson introduced testimony from Dr. Scott that he had been employed by her to "determine what the tolerance level was in the community for adult materials." A.P., p. A-7. In accordance with those

instructions Dr. Scott testified that he conducted a study of businesses in the community that carried "adult materials." Dr. Scott testified at length as to how he conducted his "study," but when his testimony is considered in its entirety it is evident that his "study" was limited to determining the availability and accessibility in the community of those materials he defined as "adult materials." A.P., pp. A-8 to A-12. Dr. Scott defined "adult materials" as "extremely mild to naked shots of women [sic] breasts and vulva area and penis and so forth up where you have pictures of couples together where they are engaging in oral, anal and vaginal sex." A.P., p. A-8. This definition of "adult material" bears no relation to the materials at issue in this case. All the magazines which Ms. Anderson was charged with selling depict actual acts of vaginal, anal or oral intercourse on each and every page. A.P., p. A-10. The two magazines which Ms. Anderson was convicted of selling, "Ass Masters Special 3" and "Ass Masters Special 4", depict actual acts of anal intercourse on each and every page. The magazines contain little or no printed material.

Based upon Dr. Scott's study of the availability and accessibility of "adult materials" in the community, Ms. Anderson attempted to introduce Dr. Scott's opinion as to whether the materials at issue in this case depicted and described patently offensive sexual conduct specifically defined by N.C.G.S. § 14-190.1 (1985) and whether the materials at issue were patently offensive to the average adult in the community. A.P., pp. A-8 to A-9. The trial court sustained the State's objection to the proffered testimony. On appeal the Supreme Court of North Carolina refused to find that the trial court had abused its discretion in excluding this testimony. In support of its opinion the Supreme Court of North Carolina noted that:

> "Dr. Scott's study does not appear in any way to have focused on whether the average adult applying contemporary community standards would find magazines limited exclusively to pictorial portrayals of actual acts of 'vaginal, anal or oral intercourse' to be patently offensive."

A.P., p. A-10.

> "It is crystal clear from Dr. Scott's testimony that his study was designed to determine nothing more than the availability and accessibility of an extremely broad range of sexually suggestive materials which he described as 'adult material.'"

A.P., p. A-11.

> "Dr. Scott's study was simply too unfocused and unspecific to provide him with sufficient basis to give an expert opinion regarding whether the average adult applying contemporary community standards would find the magazines at issue to be patently offensive . . . . His testimony indicated that he made no effort in his study to identify or isolate any factors bearing on the average adult's reaction to materials that were limited to pictorial portrayals of actual acts of 'vaginal, anal or oral intercourse.'"

A.P., pp. A-11 to A-12.

In light of its determination that Dr. Scott's "study" was not sufficiently focused to provide him with any data which would indicate whether the average adult applying contemporary community standards would find the materials at issue to be patently offensive, the Supreme Court of North Carolina held that Dr. Scott was no better qualified than a jury to address this question, that his testimony could not assist the jury, and, therefore, the trial court properly exercised its discretion to exclude this testimony.

It is well established that expert testimony is admissible in obscenity trials. *Smith v. California*, 361 U.S. 147, 164-67 (1959); *Kaplan v. California*, 413 U.S. 115, 121-122 (1973); *Miller v. California*, 413 U.S. 15, 31 n.12 (1972). However, this Court has specifically held that a trial court retains "wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony."

Hamling v. United States, 418 U.S. 87, 108 (1974). Furthermore, this Court has refused to create special rules of evidence applicable only in those cases involving issues of obscenity. As this Court noted in *Hamling*:

> "Petitioners have very much the laboring oar in showing that [evidentary] rulings constitute reversible error, since 'in judicial trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence.'"

Id. at 124-125 (quoting *NLRB v. Donnelly Company*, 330 U.S. 219, 236 (1947)).

Under both United States and North Carolina law, expert opinion is admissible only when it "will assist the trier of the fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702; N.C.G.S. § 8C-1, Rule 702 (1986). Both United States and North Carolina law presume that expert testimony will be based on facts or data sufficient to support an opinion relevant to an issue before the jury. Fed. R. Evid. 703; N.C.G.S. § 8C-1, Rule 703 (1986). Furthermore, under United States and North Carolina law, if the facts or data which form the basis for the expert's opinion are not admissible in evidence, then the trial court must determine whether they are of a type reasonably relied upon by experts in forming opinions or inferences on the subject in question. *Id.* Finally, both United States and North Carolina law permit trial judges to exclude even relevant testimony if its probative value is outweighed by the danger that it would confuse the issues before the court or mislead the jury. Fed. R. Evid. 403; N.C.G.S. 8C-1, Rule 403 (1986).

In this case, Dr. Scott simply testified as to the availability and accessibility of "adult materials." This Court, however, has held that:

> [T]he availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the non-obscenity of the materials which the defen-

> dant is charged with circulating . . . . 'Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.'"

Hamling v. United States, 418 U.S. at 124-125 (quoting *United States v. Manarite*, 448 F.2d 583, 593 (2nd. Cir.), *cert. denied*, 404 U.S. 947 (1971)).

Insofar as the availability of similar materials is not probative of the obscene character of the material in issue, the trial court in this case did not abuse its discretion when it determined that Dr. Scott's study of availability and accessibility of "adult materials" failed to provide an adequate basis for his opinion regarding the patent offensiveness of the materials in question. The propriety of the trial court's decision to exclude this testimony becomes even more certain when the Court considers the fact that Dr. Scott's availability and accessibility "study" encompassed all the materials which he defined as "adult materials," including depictions of extremely mild sexual activity and mere nudity. A.P., p. A-8. Those materials are not at all similar to the magazines in question which "contain photographic depictions of actual 'acts of vaginal, anal or oral intercourse' on each and every page." A.P., pp. A-10 and A-11. Therefore, the facts which allegedly provided the basis for Dr. Scott's opinion were even less probative than the evidence which this Court held had been properly excluded in *Hamling v. United States*, 418 U.S. at 124-127.

After reviewing the applicable law and the record of Dr. Scott's testimony, the Supreme Court of North Carolina determined that Dr. Scott's study was too unfocused and unspecific to provide a sufficient basis for an expert opinion regarding whether the average adult applying contemporary community standards would find the magazines at issue in this case to be patently offensive. In short, the court found that Dr. Scott's testimony was the sort of evidence that this Court has noted to have "often made a mockery out of the otherwise sound concept of expert testimony." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6 (1973).

After thorough review, the Supreme Court of North Carolina determined that Dr. Scott was no better qualified than the jury to address the question at issue and his opinion would not assist the jury to understand the evidence or to determine any fact in issue. Therefore, the court ruled that the trial court had not abused its discretion when it excluded Dr. Scott's opinions from evidence. A.P., p. A-12. The Respondent contends that this decision is not in conflict with any decision of this Court and did not deprive Petitiioner of her due process right to a fair trial.

IV. THE SUPREME COURT OF NORTH CAROLINA'S HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED PORTIONS OF DR. WINNICK'S TESTIMONY IS CONSISTENT WITH THIS COURT'S OPINIONS AND THE RULES OF EVIDENCE.

In her case-in-chief Ms. Anderson also attempted to introduce the results of a survey which Dr. Winnick had conducted in the Catawba County area. The questions in this survey were not designed to elicit any responses which would be relevant to the issue of whether the average adult applying contemporary community standards would find the material was patently offensive or appealed to a prurient interest in sex. Instead, after determining whether the person answering the survey lived in Catawba County, the survey first asked whether the interviewee believed that standards had changed in recent years so that depiction of nudity was more acceptable or less acceptable in movies and publications. A.P., p. A-13. The survey then asked one question in four different guises. That question was, in effect: Do you believe that consenting adults should have the right to purchase and view materials depicting every kind of sexual activity no matter how graphically depicted? The survey concluded with a question to determine whether the person being surveyed understood the terms used in the survey. A.P., pp. A-13 to A-14.

The trial court permitted Dr. Winnick to testify to the results of the question to determine whether the interviewee

was a resident of Catawba County, to the results of the question to determine whether the interviewee believed that the depiction of nudity and sex had recently become more or less acceptable, and to the results of the question to determine whether the interviewee understood the terms being used in the survey. The trial court, however, prohibited Dr. Winnick from testifying about any opinion that he might have had based upon responses to the other four questions on grounds that the testimony would not assist the jury to understand the evidence or to determine a fact in issue. On appeal the Supreme Court of North Carolina found that the trial court had not abused its discretion when it excluded this testimony. A.P., pp. A-13 to A-15.

In the opinion of the Supreme Court of North Carolina, the portion of the survey which was excluded from evidence "amounted to a little more than a referendum on the desirability of the First Amendment and N.C.G.S. § 14-190.1." A.P., p. A-15. The issue before the jury in this case was not whether consenting adults should have the right to purchase and view materials depicting every kind of sexual activity, but whether the materials which provided the basis for the charges against Petitioner were obscene as defined in N.C.G.S. § 14-190.1.* As this Court held in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973):

> "We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulations simply because they are exhibited for consenting adults only."

---

* The Supreme Court of North Carolina has held that the definition of obscenity incorporated in N.C.G.S. § 14-190.1 (1985) comports with the standards this Court established in *Miller v. California*, 413 U.S. 15 (1973). *Cinema I Video v. Thornburg*, 83 N.C.App. 544, 351 S.E.2d 305 (1986), aff'd. 320 N.C. 485, 358 S.E.2d 383 (1987). Petitioner does not challenge that holding in this case.

In presenting Dr. Winnick's testimony regarding his survey, Ms. Anderson was obviously attempting to confuse the jury with evidence of the consenting adult "defense." In light of that fact, the Supreme Court of North Carolina properly affirmed the trial court's decision to exclude this testimony, not only on grounds that it would not assist the jury to understand the evidence or determine a fact at issue, N.C.G.S. § 8C-1, Rule 702 (1986); Fed. R. Evid. 702, but also on the grounds that probative value of such evidence was substantially outweighed by the danger of confusing or misleading the jury, N.C.G.S. § 8C-1, Rule 403 (1986); Fed. R. Evid. 403. A.P., pp. A-14 to A-15. Therefore, the Supreme Court of North Carolina's holding on this issue is not in conflict with the opinions of this Court or the Federal Rules of Evidence and did not deprive the Petitioner of her due process right to a fair trial.

V. THE SUPREME COURT OF NORTH CAROLINA PROPERLY REFUSED TO REVERSE THE PETITIONER'S CONVICTION ON GROUNDS OF PROSECUTORIAL MISCONDUCT.

In *Berger v. United States*, 295 U.S. 78, 88 (1975) this Court stated that:

> "[The State's attorney] may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce the wrongful conviction as it is to use every legitimate means to bring about a just one."

However, in reversing the defendant's conviction in *Berger* the Court noted:

> "[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a prob-

> able cummulative effect on the jury which cannot be disregarded as inconsequential."

Id. at 89.

In contrast to the facts before the Court in *Berger*, the prosecutor's argument in this case was not undignified and intemperate nor did it contain improper insinuations and assertions calculated to mislead the jury. While the trial court did sustain some of the Petitioner's objections to prosecutor's arguments, the Supreme Court of North Carolina found that the prosecutors did not on those occasions attempt to circumvent the ruling of the trial court or return to the improper arguments. A.P., p. A-19. On other occasions the trial court overruled the Petitioner's objections and the Supreme Court of North Carolina found no error in those decisions. A.P., pp. A-16 to A-19. Moreover, prior to beginning his argument the prosecutor cautioned the jury that what he was about to say was neither evidence nor law and the trial court subsequently gave proper instructions on the law. A.P., p. A-17. *Cf. Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974).

In her petition, Ms. Anderson emphasizes the fact that, on one occasion in a long argument, one prosecutor argued:

> "I contend to you that it is obviously obscene, clearly obscene and patently offensive. Picture after picture of anal intercourse. What is more unhealthy than anal intercourse? How could it be anything but obscene?"

A.P., p. A-17. At this point the defense objected and the trial court overruled the objection. On appeal the Supreme Court of North Carolina held that this argument was within the latitude allowed counsel in closing argument and the trial court did not err in overruling the petitoner's objection. A.P., p. A-17. But even if this argument exceeds the wide latitude allowed counsel in closing argument, the prosecutor made this comment on only one occasion. This is not a case of pronounced and persistent misconduct calculated to inflame and mislead the jury. As this Court held in *Darden v. Wainwright*, 477 U.S. 168 (1986):

> "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' *Darden v. Wainwright*, 699 F.2d, at 1036. The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' *Donnelly v. DeChristoforo*, 416 U.S. 637."

Id. at 181.

The Supreme Court of North Carolina carefully reviewed the Petitioner's contentions regarding this argument and determined that, in light of the prosecution's entire argument and the trial court's instructions on the law, Ms. Anderson suffered no prejudice as a result of this argument. A.P., p. A-17. Consequently, the Respondent contends that the prosecutor's argument did not deprive the Petitioner of her due process right to a fair trial.

CONCLUSION

The Petitioner has failed to demonstrate that her trial was infected with error so egregious and fundamentally unfair that she was denied her right to due process. In fact, the Petitioner has failed to show that the decisions of the Supreme Court of North Carolina on any of the issues presented in the petition conflict with the applicable decisions of this Court or Federal law. Finally, the Petitioner has failed to show any other special or important reasons for granting a writ of certiorari in this case. Therefore, the Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted, this 7th day of November, 1988.

LACY H. THORNBURG
Attorney General

Edwin M. Speas, Jr.
Special Deputy Attorney General

Thomas J. Ziko
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7387

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES was served upon counsel for Petitioner by depositing said copy in the United States Mail, postage prepaid, addressed as follows:

Paul J. Cambria, Jr.,
LIPSITZ, GREEN, FAHRINGER, ROLL,
SCHULLER & JAMES
One Niagara Square
Buffalo, New York 14202
Edward T. Hinson

Edward T. Hinson
JAMES, McELROY & DIEHL
600 South College Street
Charlotte, North Carolina 28202

This the 7th day of November, 1988.

LACY H. THORNBURG
Attorney General

Edwin M. Speas, Jr.
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7387